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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 236

THE UNITED STATES OF AMERICA, ON RELATION OF SAMUEL OSTRAGER AND SAMUEL OSTRAGER, IN HIS OWN BEHALF, PETITIONERS,

vs.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

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UNITED STATES OF AMERICA.

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

No. 259 (Civil Action).

UNITED STATES OF AMERICA ON RELATION OF SAMUEL OSTRAGER AND SAMUEL OSTRAGER IN HIS OWN BEHALF,

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

Appearances:

Messrs: Alexander H. Schullman; Orloff & Katz, and Katz and Amato,
Attorneys for Plaintiffs-Appellants-Appellees.

Messrs: Deutsch & Kerrigan, (R. Emmett Kerrigan),
Attorneys for Defendants-Appellees-Appellants.

APPEALS from the District Court of the United States for the Eastern District of Louisiana, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 10th day of March, 1941, (Plaintiff's notice of appeal), and the 31st day of March, 1941, (Defendant's notice of appeal), respct. at the City of New Orleans, Louisiana.

Extension of time granted by the Honorable United States District Court, Eastern District of Louisiana, bringing the return day up to and including May 19th, 1941. (Plaintiff's extension).

COMPLAINT.

Filed February 1st, 1940.

In the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

United States of America on relation of Samuel Ostrager and Samuel Ostrager in his own behalf,

vs. Civil Action No. 259.

New Orleans Chapter, Associated General Contractors of America, Inc., a Louisiana Corporation, W. Horace Williams Co., Inc., a Louisiana Corporation, Doullut and Ewin, Inc., a Louisiana Corporation, R. P. Farnsworth & Co., Inc., a Delaware Corporation, Herman T. Makofsky, Lionel F. Favret, Henry Boh, Arthur P. Boh, Summa Caldwell, Monte E. Hart, Theodore A. Pittman, Olin J. Farnsworth, W. Horace Williams, James P. Ewin, John V. Burkes, Robert T. Burkes and Arthur Lagarde.

United States of America on relation of Samuel Ostrager and Samuel Ostrager, in his own behalf, plaintiffs above named, bring this civil action against New Orleans Chapter, Associated General Contractors of America, Inc., et al., defendants above named on a cause of action whereof the following is a statement:

1. Samuel Ostrager, the relator, is a citizen of the United States, residing in the City of Huntington Park, County of Los Angeles, State of California and that he institutes and prosecutes this action in the name of and for and on behalf of The United States of America and in his own behalf under and in pursuance of the statutes of the United States in such cases made and provided by reason of Sections 231, 232, 233, 234 and 235 of Title 31 of the United States Code Annotated.

2. The defendants, Herman T. Makofsky, Lionel F. Favret, Henry Boh, Arthur P. Boh, Summa Caldwell, Monte E. Hart, Theodore A. Pittman, Olin J. Farnsworth, W. Horace Williams, James P. Ewin, John V. Burkes, Robert T. Burkes, Arthur Lagarde, are citizens of the United States and residents of the Parish of Orleans and State of Louisiana, and that at all times hereinafter mentioned said defendants were and still are such citizens and residents and subject to the provisions of the Laws of the United States.

3. That at all times hereinafter mentioned, New Orleans Chapter, Associated General Contractors of America, Inc., W. Horace Williams Co., Inc. and Doullut & Ewin, Inc., defendants above named were and now are corporations duly organized and existing under and by virtue of the laws of the State of Louisiana, having their respective principal places of business in New Orleans, Louisiana, and at all times hereinafter mentioned R. P. Farnsworth & Co., Inc. was and is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having its principal place of business in New Orleans, Louisiana.

4. That during all or part of the time hereinafter mentioned, the above named corporations and persons were engaged in the business of general contracting, carrying on business in and about said New Orleans, Louisiana and were members of said New Orleans Chapter, Associated General Contractors of America, Inc., that is to say:

Summa Caldwell, Verne Caldwell and Monte E. Hart, were and are partners doing business as Caldwell Bros. & Hart; Henry Boh, Arthur P. Boh and Arthur Lagarde were and are partners doing business as Boh & Lagarde;

Robert T. Burkes and John V. Burkes were and are partners doing business as Burkes Bros.; Theodore A. Pittman, Houston C. Pittman and Everett Pittman were and are partners doing business as Pittman Bros. Construction Co., Olin J. Farnsworth was said and is the manager of R. P. Farnsworth & Co., W. Horace Williams was and is the manager of W. Horace Williams Co., Inc., James P. Ewin was and is the manager of Doullut & Ewin, Inc., Herman T. Makofsky operated as a general contractor under his own name, Lionel F. Favret operated as a general contractor under his own name.

5. The defendants at all times hereinafter mentioned were not and are not in the military or naval forces of the United States or in the militia called into or actually employed in the service of the United States.

6. The acts of the defendants above named and each of them were done by the defendants in contravention and violation of the provisions of the laws and statutes of the United States, and more particularly the following:

"Sec. 80. (Criminal Code, section 35, amended.) Presenting false claims; aiding in obtaining payment thereof. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and

swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (R. S. Sec. 5438; May 30, 1908, c. 235, 35 Stat. 555; Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015.)"

Sec. 80—Title 18—U.S.C.A.

"Sec. 83. (Criminal Code, section 35, amended.) Conspiracy to defraud United States in regard to allowance or payment of false claims. Whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (R. S. Sec. 5438; May 30, 1908, c. 235, 35 Stat. 555; Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015.)"

Sec. 93—Title 18—U. S. C. A.

7. That for the purposes of relieving destitution, providing relief, creating and increasing employment, expediting a Public Works program and providing for work

upon and construction of useful Public Works and projects, the Congress of the United States enacted the following named Acts and Joint Resolutions, to-wit:

The Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act fiscal year 1936 and the First Deficiency Appropriation Act of 1936;

And pursuant to such Acts and Resolutions and to the orders and rules promulgated under their authority, certain sums of money were appropriated for the purposes declared in such Acts and Resolutions, and out of said sums of money there were allocated certain sums of money to aid in the construction of certain buildings in the City of New Orleans, Louisiana for the Board of Administrators of the Charity Hospital of Louisiana at New Orleans, and particularly, the foundation for the Main Building of the said Charity Hospital, said project being known as Docket Number 4529 R and 4529 D.

8. That for the purpose of aiding said project, a grant of money not to exceed $715,380 was made by the United States of America through the Federal Emergency Administration of Public Works (commonly referred to as the Public Works Administration) to the Board of Administrators of the Charity Hospital of Louisiana at New Orleans.

9. That for the purpose of letting the contracts for the construction work in connection with said project the Board of Administrators of the Charity Hospital of Louisiana at New Orleans advertised and called for bids from persons, including the defendants herein, seeking to obtain construction contracts for the preformance of the work called for by said project.

10. That the defendants above named throughout a period of time beginning on or about January 6th, 1937 and continuing each and every day thereafter until on or about August 20th, 1937 in the Parish of Orleans, State of Louisiana and elsewhere did knowingly, wilfully, unlawfully and feloniously conspire, combine, confederate, agree and have a tacit understanding together and with each other, and with divers other persons unknown to the United States and your relater, plaintiffs above named; to defraud and otherwise injure and damage the United States as is more particularly set forth hereinafter.

11. That is pursuance of said conspiracy the defendants did on January 6th, 1937 at New Orleans, Louisiana adopt a resolution at a regular meeting of the members of the defendant, New Orleans Chapter, Associated General Contractors of America, Inc., requiring each member to add to the amount of each bid thereafter offered and submitted by him, the association fees then in force, regardless of whether such bid was on construction work for Federal or State Governments or otherwise.

12. That in pursuance of such conspiracy on April 12th, 1937 at New Orleans, Louisiana, Herman T. Makofsky, Lionel F. Favret, R. P. Farnsworth & Co., Inc., W. Horace Williams Co., Inc., Doullut & Ewin, Inc., Caldwell Bros. & Hart, Boh & Lagarde, Burkes Bros., Pittman Bros. Construction Co. entered an agreement that they would add in excess of $7,500, representing estimating, quantity survey and chapter fees of all bidders on the contract for the foundation work for the Main Building of the Charity Hospital at New Orleans, Louisiana, and further agreed that the successful bidder would pay such excesses to the New Orleans Chapter, Associated General Contractors of America, Inc. for the use and benefit and to be distributed to the defendants and the said New

Orleans Chapter, Associated General Contractors of America, Inc.

13. That in pursuance of said conspiracy in the Parish of Orleans in the New Orleans Division of the Eastern District of Louisiana, and within the jurisdiction of the Court, the defendants did knowingly, wilfully and unlawfully and with intent to defraud the United States, divert, attempt to divert and assist in diverting for the benefit of the said defendants and W. F. Jackson Co., certain monies allocated out of an appropriation under the authority of the Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act fiscal year 1936 and the First Deficiency Appropriation Act of 1936 for the purpose of constructing certain buildings in the City of New Orleans, Louisiana, for the Board of Administrators of the Charity Hospital of Louisiana at New Orleans, to-wit: The foundation for the Main Building of the said Charity Hospital, said project being known as Docket Number 4529 R and 4529 D, the cost of which project was financed in part out of appropriations aforesaid by the Federal Emergency Administration of Public Works, an Agency of the United States of America, the said defendants and W. F. Jackson Co. being then and there persons not entitled to any benefit under the provisions of the said Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act fiscal year 1936 and the First Deficiency Appropriation Act of 1936, that is to say, that they, the said general contractors, being the only bidders on the project aforesaid did wilfully and unlawfully add to their individual bids, which were to be submitted in connection with the project aforesaid prior to their submission certain agreed amounts which were composed of sums, portions of which were to be collected and were collected by the successful bidder out of the appropriations aforesaid and were to be paid and

were paid by the successful bidder to the New Orleans Chapter, Associated General Contractors of America, Inc., and by said Chapter distributed to the said defendants and W. F. Jackson Co., all for the purpose and with the intent of obtaining funds from the said allocation and appropriation of monies aforesaid for the use and benefit of the defendants and W. F. Jackson Co., persons not entitled thereto, and to the damage of the United States, that the bids submitted, which included the excess amounts which the defendants and W. F. Jackson Co. agreed to add to their individual bids were as follows:

R. P. Farnsworth & Co., $715,380.

Doullut & Ewin, Inc., $885,000.

Herman T. Makofsky, $905,350.

Lionel F. Favret, $908,000.

W. Horace Williams & Co., Inc., and Caldwell Bros. & Hart, $773,113.

Boh & Lagarde, $894,400.

Burkes Bros., $904,900.

Pittman Bros. Construction Co., $959,740.

14. That the defendants above named in carrying out the said conspiracy falsely and fraudulently executed and delivered or caused to be executed and delivered certain certificates containing substantially the following:

"The undersigned hereby certifies that this Proposal is genuine and not sham or collusive, or made in the inter-

est or in behalf of any person, firm or corporation not herein named, and that the undersigned has not, directly or indirectly, induced or solicited any other bidder to submit a sham bid, or any other person, firm or corporation to refrain from bidding, and that the undersigned has not in any manner sought by collusion to secure for himself an advantage over any other bidder.

Firm name: .....
By: .....
Title: .....
Official Address: ....."

which certificates were false, fraudulent and fictitious and made for the purpose and with the intent of cheating and defrauding the Government of the United States.

15. That pursuant to the aforesaid conspiracy and in furtherance thereof, all of the aforesaid defendants through the fraudulent and unlawful conduct hereinbefore described, did falsely and fraudulently submit bids in furtherance of said conspiracy, did falsely and fraudulently receive awards and enter into said construction contract in furtherance of said conspiracy, did submit false and fraudulent written claims for payment thereof, did falsely and fraudulently receive from the United States Government large sums of money, and did make or cause to be made false and fraudulent statements or representations in regard to said bids and their claims thereon, and did make or use or cause to be made or used false and fraudulent certificate or certificates knowing the same to contain false and fraudulent or fictitious statements or entries for the purpose and with the intent of cheating and defrauding the Government of the United States, and that the Government of the United States was cheated and defrauded and sustained damages thereby in the amount of $7,620.

Wherefore, plaintiffs demand judgment against the said defendants in the sum of Fifteen Thousand Two Hundred Forty and No/100 ($15,240.00) being double the amount of damages sustained by the United States as above set forth, or such sum that the Court may find, together with interest thereon in such cases made and provided; and

That the Court enter judgment against the defendants and each of them for the sum of Two Thousand ($2,000.00) Dollars for the violation hereinbefore set forth as aforesaid in such cases made and provided.

That the Court enter judgment against the defendants for the cost of this suit.

Plaintiffs demand a jury trial.

ALEXANDER H. SCHULLMAN,
ORLOFF & KATZ;
By: JOE ORLOFF,
Attorneys for Plaintiffs.

ALEXANDER H. SCHULLMAN and
ORLOFF & KATZ,
415 Chester Williams Building,
Los Angeles, California.

9

ANSWER.

Filed July 18th, 1940.

To the Honorable Judges of the District Court of the United States in and for the Eastern District of Louisiana, New Orleans Division:

Now into Court, through undersigned counsel, come New Orleans Chapter, Associated General Contractors of

America, Inc., Doullut & Ewin, Inc., R. P. Farnsworth & Company, Inc., W. Horace Williams Company, Inc., Arthur P. Boh, Henry Boh, Burkes Bros., John V. Burkes, Robert T. Burkes, Caldwell Bros. & Hart, Summa Caldwell, Verne Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Pittman Bros. Construction Company, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams, made defendants herein, and for answer to the complaint filed herein, say:

For a First Defense.

The complaint fails to state a claim against defendants upon which relief can be granted.

For a Second Defense.

On December 2, 1939, defendants herein were indicted under two counts by a Grand Jury of the United States District Court in and for the Eastern District of Louisiana, New Orleans Division, for the same alleged offense which forms the basis of the instant complaint. The aforesaid criminal proceeding bears No. 19,843 on the Criminal Docket of this Court. Thereafter, the first count of said indictment was nolle prosequied, and while the second count charged no offense against defendants, or, if it did, defendants were in no event guilty thereunder, a plea of nolo contendere was entered by defendants thereto in order to avoid the expense, difficulties and inconvenience of protracted litigation. On or about January 15, 1940, fines were levied against each of defendants on the second count of said indictment. Said judgment and fines operate as a bar to the instant proceeding under the Fifth Amendment to the Constitution of the United States.

For a Third Defense.

I.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations concerning plaintiff's citizenship and residence contained in paragraph I of the complaint. Defendants deny the truth of the remaining allegations of said paragraph.

II.

Defendants admit the truth of the allegations contained in paragraph II of the complaint.

III.

Defendants admit the truth of the allegations contained in paragraph III of the complaint.

IV.

Defendants aver that the partnership of Boh & Lagarde was dissolved shortly after it submitted its bid on the project referred to in the complaint, and that immediately thereafter Henry Boh and Arthur Boh continued to do business under the name of Boh Brothers Construction Company. Defendants further aver that said Boh & Lagarde, and said partners thereof, were never members of defendant New Orleans Chapter, Associated General Contractors of America, Inc., and that W. Horace Williams Company, Inc., and W. Horace Williams are not members at the present time. Except as herein denied, defendants admit the truth of the allegations contained in paragraph IV of the complaint.

V.

Defendants admit the truth of the allegations contained in paragraph V of the complaint.

VI.

Defendants deny the truth of the allegations contained in paragraph VI of the complaint.

VII.

Defendants deny the truth of the allegations contained in paragraph VII of the complaint, except as may be admitted herein. Defendants aver that the Acts, Joint Resolutions, Orders and Resolutions alleged in said paragraph speak for themselves. Defendants admit that the Board of Administrators of the Charity Hospital of Louisiana at New Orleans, received certain funds from the Federal Emergency Administration of Public Works to aid it in the construction of certain buildings in the City of New Orleans, Louisiana, including the foundation for the main building of the said Charity Hospital.

VIII.

Defendants are without knowledge or information sufficient to justify a belief in the truth of the allegations contained in paragraph VIII of the complaint. Defendants admit, however, that said Federal Emergency Administration of Public Works made a grant of money, the exact amount of which is unknown to defendants, to said Board of Administrators of the Charity Hospital of Louisiana at New Orleans, for said project. Defendants further aver that the amount of said grant was only a minor portion of that required by said Charity Hospital to complete said construction project.

IX.

Defendants admit the truth of the allegations contained in paragraph IX of the complaint.

X.

Defendants deny the truth of the allegations contained in paragraph X of the complaint.

XI.

Defendants deny the truth of the allegations contained in paragraph XI of the complaint, except as may be admitted herein. Defendants aver that at a meeting of New Orleans Chapter, Associated General Contractors of America, Inc., held on January 6, 1937, a resolution was adopted reading as follows: "That in future Association fees are mandatory on all jobs, regardless of whether same are Federal, State or otherwise." Defendants further aver that all of the defendants, with the exception of said Boh and Lagarde, and said individual partners thereof, were members of said New Orleans Chapter, Associated General Contractors of America, Inc., on said date.

XII.

Defendants deny the truth of the allegations of paragraph XII of the complaint, except as may be admitted herein. Defendants admit that the parties named in said paragraph agreed that each of them would include in his or its bid on said project, the amount of estimating, quantity survey and chapter fees of all other bidders on said project, and that the successful bidder would pay such amount to New Orleans Chapter, Associated Gen-

eral Contractors of America, Inc., which was to retain therefrom the chapter fees due it, and out of the balance reimburse the other said contractors the amount of said estimating and quantity survey fees incurred by them in bidding on said project. Defendants aver that said practice was not only entirely lawful, but actually beneficial to said Charity Hospital of Louisiana at New Orleans, and had the effect of rendering the construction of said project cheaper than it would otherwise have been. That said practice was known to the Board of Administrators and the architects of said Charity Hospital, acting for it, prior to, and at the time of, submission of said bids, and was approved by them. That said practice was also known at said times to the officials of the Federal Government concerned in the supervision of said project in its behalf.

XIII.

Defendants deny the truth of the allegations contained in paragraph XIII of the complaint, except as may be admitted herein. Defendants admit that they were the only bidders on said project; that the amounts of their respective base bids are set forth correctly in said paragraph, except that said base bid of said Boh & Lagarde was $894,400; that each of said bids included a certain amount to cover the estimating, quantity survey and chapter fees of all of the other said bidders on said project; that defendant R. P. Farnsworth & Company, Inc., was the successful bidder and paid said amount to defendant, New Orleans Chapter, Associated General Contractors of America, Inc.; that out of said amount the latter retained said chapter fees due it, paid W. F. Jackson Company its charges for making a quantity survey of said project for said defendant contractors, and reimbursed said defendant contractors for the amount of the

estimating fees incurred by them in bidding on said project.

XIV.

Defendants deny the truth of the allegations contained in paragraph XIV of the complaint.

XV.

Defendants deny the truth of the allegations contained in paragraph XV of the complaint.

Counter-Claim.

I.

Samuel Ostrager, plaintiff herein and a resident of California, has wilfully and maliciously included in his said complaint, false and defamatory statements concerning defendants, falsely charging them, and each of them, with conspiring to defraud, injure, and cheat the United States and divert and assist in diverting its monies, and submitting false and fraudulent written claims for payment of money, and with committing other offenses, as set forth in said complaint.

II.

As a result of said false, malicious and libelous statements defendants W. Horace Williams Company, Inc., Doullut & Ewin, Inc., and R. P. Farnsworth & Company, Inc., have been injured in the sum of one hundred thousand ($100,000.00) dollars each; defendant, Arthur P. Boh, Henry Boh, John V. Burkes, Robert T. Burkes, Verne Caldwell, Summa Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Theodore A.

Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams have been injured in the sum of fifty thousand ($50,000.00) dollars each.

III.

Defendants demand trial by jury.

Wherefore, the premises considered, defendants pray that the complaint herein be dismissed at plaintiff's costs, and that judgment be entered herein in favor of defendants, W. Horace Williams Company, Inc., Doullut & Ewin, Inc., and R. P. Farnsworth & Company, Inc., and against plaintiff, Samuel Ostrager, in the sum of one hundred thousand ($100,000.00) dollars each; that judgment be rendered herein in favor of defendants, Arthur P. Boh, Henry Boh, John V. Burkes, Robert T. Burkes, Verne Caldwell, Summa Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams, and against plaintiff, Samuel Ostrager, in the sum of fifty thousand ($50,000.00) dollars each; and for such other and further relief as equity, law and the nature of the case may require.

EBERHARD P. DEUTSCH,
(Eberhard P. Deutsch)
of
DEUTSCH AND KERRIGAN,
Attorneys for Defendants.

17th Floor, Hibernia Bank Bldg.,
New Orleans.

MOTION TO DISMISS COUNTER-CLAIM OF DEFENDANTS, TO HAVE COUNTER-CLAIM STRICKEN, AND TO STRIKE FROM ANSWER CERTAIN ALLEGATIONS.

15 Filed August 20th, 1940.

(Title Omitted.)

Samuel Ostrager, plaintiff, by and through his attorneys, Alexander H. Schullman, and Orloff & Katz, and Katz & Amato, moves the Court as follows:

1. To dismiss the counter-claim of defendants in the above entitled action on the ground that it fails to state a claim against plaintiff for which relief can be granted.

2. To have said counter-claim of defendants stricken on the ground that it is improperly pleaded as part of the above entitled proceedings.

3. To have said counter-claim of defendants stricken on the ground that the alleged cause of action therein stated is improperly pleaded in advance of the termination of plaintiff's cause of action.

4. To strike from the answer of defendants each and every, all and singular, of the allegations contained in the second defense of said answer on the ground that said allegations in said second defense constitute conclusions of law, impertinences and immaterialities.

5. T strike so much of paragraph XII of the third defense of defendants' answer, that is, the words and figures, as follows:

"Defendants aver that said practice was not only entirely lawful, but actually beneficial to said Charity Hospital of Louisiana at New Orleans, and had the effect of rendering the construction of said project cheaper than it would other wise have been. That said practice was known to the Board of Administrators and the architects of said Charity Hospital, acting for it, prior to, and at the time of, submission of said bids, and was approved by them. That said practice was also known at said times to the officials of the Federal Government concerned in the supervision of said project in its behalf."

on the ground that the said allegations are impertinent, immaterial and conclusions of law.

Said motion will be made upon the records and files of the above entitled matter.

Dated: August 15, 1940.

ALEXANDER H. SCHULLMAN,
and
ORLOFF & KATZ, and
KATZ & AMATO,
By (Signature Illegible),
Attorneys for Plaintiff, Samuel Ostrager.

NOTICE OF MOTION TO DISMISS COUNTER-CLAIM OF DEFENDANTS, TO HAVE COUNTER-CLAIM STRICKEN, AND TO STRIKE FROM ANSWER CERTAIN ALLEGATIONS.

17 Filed August 20th, 1940.

(Title Omitted.)

To Defendants, New Orleans Chapter, Associated General Contractors of America, Inc., Doullut & Ewin, Inc.,

R. P. Farnsworth & Company, Inc., W. Horace Williams Company, Inc., Arthur P. Boh, Henry Boh, Burkes Bros., John V. Burkes, Robert T. Burkes, Caldwell Bros. & Hart, Summa Caldwell, Verne Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Pittman Bros. Construction Company, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams, and their attorneys, Deutsch and Kerrigan:

Please Take Notice that the undersigned, appearing on behalf of Samuel Ostrager, plaintiff, will bring the motion, a copy of which is attached, on for hearing before the above entitled Court at Court Room ....., before the Honorable Adrian J. Caillouet, Judge thereof, on the 28th day of August, 1940, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard.

Dated: August 15, 1940.

ALEXANDER H. SCHULLMAN,
and
ORLOFF & KATZ, and
KATZ AMATO,
By (Signature illegible)
Attorneys for Plaintiff, Samuel Ostrager.

CASE CALLED, HEARING, ARGUMENT AND SUBMISSION.

18 (Number and Title Omitted.)

Extract from the Minutes.

May Term, 1940.

New Orleans, Monday, September 23, 1940.

Court met pursuant to adjournment;

Present: Hon. Wayne G. Borah, Judge,
Hon. A. J. Caillouet, Judge.

This matter came on for hearing this day on the first and second defenses contained in the answer filed by defendants New Orleans Chapter, Associated General Contractors of America, Inc., Doullut & Ewin, Inc., R. P. Farnsworth & Company, Inc., W. Horace Williams Company, Inc., Arthur P. Boh, Henry Boh, Burkes Bros., John B. Burkes, Robert T. Burkes, Caldwell Bros. & Hart, Summa Caldwell, Verne Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Pittman Bros. Construction Company, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams; on the motion of said defendants for a separate trial of their counter-claim; on plaintiff's motion to strike said counter-claim, and on the first defense plead in the answer of defendant Arthur Lagarde.

Present:

Julius Katz, Esq.,
Attorney for Plaintiff.

E. P. Deutsch, Esq.,
Attorney for Defendants New Orleans Chapter, Associated General Contractors of America, Inc., Doullut & Ewin, Inc., R. P. Farnsworth & Company, Inc., W. Horace Williams Company, Inc., Arthur P. Boh, Henry Boh, Burkes Bros., John B. Burkes, Robert T. Burkes, Caldwell Bros. & Hart, Summa Caldwell, Verne Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel Favret, Pittman Bros. Construction Company, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams.

Robt. A. Pascal, Esq.,
Attorney for Arthur Lagarde.

Plaintiff having moved orally for a continuance herein, it is Ordered that same be, and it is, denied.

Whereupon, after hearing argument of counsel for the respective parties and evidence on behalf of defendants, the matter was submitted, when the Court took time to consider, plaintiff being granted two weeks within which to file briefs and defendants being granted three days thereafter in which to reply.

19 NOTE OF EVIDENCE.

Filed September 23rd, 1940.

(Title Omitted.)

Counsel for defendants, New Orleans Chapter, Associated General Contractors of America, Inc., Doullut & Ewin, Inc., R. P. Farnsworth & Company, Inc., W. Horace Williams Company, Inc., Arthur P. Boh, Henry Boh, Burkes Bros., John B. Burkes, Robert T. Burkes, Caldwell Bros. & Hart, Summa Caldwell, Verne Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Pittman Bros. Construction Company, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams, now offer, introduce and ask leave to file in evidence, the entire record in the case of "United States of America vs. New Orleans Chapter, Associated General Contractors of America, Inc., et al", bearing the No. 19,843 of the criminal docket of this Court.

EBERHARD P. DEUTSCH,
(Eberhard P. Deutsch)
of
DEUTSCH & KERRIGAN,
Counsel for Defendants.

17th Floor, Hibernia Bank Bldg.,
New Orleans.

New Orleans, September 23, 1940.

20 CRIMINAL RECORD OFFERED IN EVIDENCE ON SEPTEMBER 23rd, 1940.

FINDING OF TRUE BILL.

Extract from the Minutes.

November Term, 1939.

New Orleans, Saturday, December 2, 1939.

Court met pursuant to adjournment:

Present: Hon. Rufus E. Foster, Circuit Judge.

The Grand Jury for the Eastern District of Louisiana, having been adjourned to this date, the following members thereof appeared and answered to their names, to-wit:

1, Chas. R. Matthews, Foreman; 2, Walter Jensen; 3, F. M. Leguenec, Jr.; 4, M. J. Keating; 5, Patrick Morrissey; 6, M. C. Touzet; 7, Geo. M. Carnes; 8, Irvin C. Briel; 9, Louis Sere; 10, Frank S. Walshe; 11, Aug. W. Nolde; 12, B. H. Talbot, Jr.; 13, A. J. Winter; 14, J. W. Reily; 15, J. A. Cragwall; 16, Moise S. Cahn; 17, James G. Aldige; 18, R. H. Colcock, III; 19, Joseph M. Livaudais; 20, Roger Arnauld; 21, John J. Saucier; 22, Samuel M. Angell; 23, Lawrence J. Wetta.

Thereupon, the Grand Jury retired to its chambers for deliberation upon such matters as might be laid before it for investigation, and thereafter returned into open Court, and then and there, in open Court, through its foreman, returned the following Indictments, which findings were ordered to be recorded, to-wit:

INDICTMENT.

(Number and Title Omitted.)

Violation: Title 18, Sec. 88, U. S. C., Sec. 9 of Emergency Appropriation Relief Act of 1935.

A True Bill:

New Orleans, La., December 2, 1939.

CHAS. R. MATTHEWS,
Foreman.

Whereupon, it was Ordered that the Grand Jury stand adjourned subject to call.

21

INDICTMENT.

Filed December 2nd, 1939.

United States of America,
Eastern District of Louisiana,
New Orleans Division.

In the District Court of the United States, in and for the Eastern District of Louisiana, New Orleans Division, at the November term thereof, A. D. 1939.

The Grand Jurors of the United States duly impaneled, sworn and charged at New Orleans, at the term aforesaid, of the Court aforesaid, on their oaths present and charge:

I.

That heretofore, to-wit, beginning on or about the 6th day of January, 1937, the exact date being to your Grand

Jurors unknown, and continuing up to and including the date of this indictment, in the New Orleans Division of the Eastern District of Louisiana, and within the jurisdiction of this Court, the following:

New Orleans Chapter, Associated General Contractors of America, Inc., a Louisiana corporation, with its principal place of business in New Orleans, Louisiana;

R. P. Farnsworth & Co., Inc., a Delaware corporation, with its principal place of business in New Orleans, Louisiana;

W. Horace Williams Co., Inc., a Louisiana corporation, with its principal place of business in New Orleans, Louisiana;

Doullut & Ewin, Inc., a Louisiana corporation, with its principal place of business in New Orleans, Louisiana;

Herman T. Makofsky;
Lionel F. Favret;
Henry Boh;
Arthur P. Boh;
Arthur Lagarde (Dismissed);
Summa Caldwell;
Monte E. Hart;
Theodore A. Pittman;
Olin J. Farnsworth;
W. Horace Williams;
James P. Ewin;
John V. Burkes; and
Robert T. Burkes,

whose names are to your Grand Jurors otherwise unknown, the defendants herein, and divers other persons

to your Grand Jurors unknown, did unlawfully, wilfully, knowingly and feloniously combine, conspire, confederate and agree together and with each other to defraud the United States and to commit certain offenses against the United States, to-wit, to violate Section 9 of the Emergency Relief Appropriation Act of 1935;

That it was the purpose, object and intent of this conspiracy to defraud the United States by diverting for the use and benefit of the defendants herein, persons not entitled thereto, funds which had been theretofore appropriated by the Congress of the United States through the passage of the Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act, fiscal year 1936 and the First Deficiency Appropriation Act of 1936, and which funds had been granted by the United States to the State of Louisiana under the provisions of the said Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act, fiscal year 1936 and the First Deficiency Appropriation Act of 1936 for use in building the Charity Hospital at New Orleans, Louisiana.

II.

That it was a part of the said conspiracy that each of the defendants submitting bids, who were the only bidders on the contract for the foundation work for the Main Building of the said Charity Hospital, would arbitrarily add to the amount of his bid on said contract a sum in excess of Seven Thousand Five Hundred Dollars ($7,500.00) which sum represented the estimating, quantity survey and chapter fees of all of the bidders on said contract;

That it was a further part of the said conspiracy that the successful bidder on said contract would pay to the

defendant New Orleans Chapter, Associated General Contractors of America, Inc., the monies received by him from the United States of America out of the appropriations aforesaid, and from the State of Louisiana, on said contract, the sum in excess of Seven Thousand Five Hundred Dollars ($7,500.00), which had been so added to the amount of his bid and said defendant New Orleans Chapter, Associated General Contractors of America, Inc., would distribute the same among the various unsuccessful bidders on the said contract, the W. F. Jackson Company, and to the defendant New Orleans Chapter, Associated General Contractors of America, Inc.

III.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further allege, charge, find and present: That in pursuance of said conspiracy and to effect the purposes and objects thereof, the following overt acts were committed by the defendants, to-wit:

1. That on or about the 6th day of January, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, a resolution was adopted at a regular meeting of the members of the defendant New Orleans Chapter, Associated General Contractors of America, Inc., requiring each member of said defendant to add to the amount of each bid thereafter offered and submitted by him, the association fees then in force, regardless of whether such bids were on Federal or State jobs, or otherwise.

2. That on or about April 12th, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendants agreed that Herman T. Makofsky, W. Horace Williams Co., Inc., Doullut & Ewin, Inc., Lionel F. Favret,

R. P. Farnsworth & Co., Inc., Caldwell Bros. & Hart, a partnership of Summa and Verne Caldwell and Monte E. Hart, Boh & Lagarde, a partnership of Henry and Arthur P. Boh and Arthur Lagarde, Burkes Bros., a partnership of Robert T. and John V. Burkes, and Pittman Bros. Construction Co., a partnership of Theodore A., Houston C. and Everett Pittman would add to their bids on the foundation of the Main Building of the Charity Hospital the fees above described, aggregating in excess of Seven Thousand Five Hundred Dollars ($7,500.00).

3. That on or about April 14th, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court the defendant R. P. Farnsworth & Co., Inc., offered and submitted and caused to be offered and submitted a bid to the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, in the sum of Seven Hundred Fifteen Thousand Three Hundred Eighty Dollars ($715,380.00) for the construction of the foundation for the Main Building of said Charity Hospital.

4. That on or about April 14th, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court the defendant Doullut & Ewin, Inc., offered and submitted and caused to be offered and submitted a bid to the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, in the sum of Eight Hundred Eighty-five Thousand Dollars ($885,000.00) for the construction of the foundation for the Main Building of said Charity Hospital.

5. That on or about April 14th, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant W. Horace Williams Co., Inc., and said partnership Caldwell Bros. & Hart offered and submitted a bid to the Administrators of the Charity Hospital of

Louisiana, at New Orleans, in the sum of Seven Hundred and Seventy-three Thousand One Hundred and Thirteen ($773,113.00) Dollars for the construction of the foundation for the Main Building of said Charity Hospital.

6. That on or about April 14, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, Boh & Lagarde, the partnership aforesaid, offered and submitteed and caused to be offered and submitted a bid to the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, in the sum of Eight Hundred Ninety-four Thousand Four Hundred Dollars ($894,400.00) for the construction of the foundation for the Main Building of said Charity Hospital.

7. That on or about April 14, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, Pittman Bros. Construction Co., the partnership aforesaid, offered and submitted and caused to be offered and submitted a bid to the Board of Administrators of said Charity Hospital of Louisiana, at New Orleans, in the sum of Nine Hundred Fifty-nine Thousand Seven Hundred Forty Dollars ($959,740.00) for the construction of the foundation for the Main Building of said Charity Hospital.

8. That on or about April 14, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, Burkes Bros., the partnership aforesaid, offered and submitted and caused to be offered and submitted a bid to the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, in the sum of Nine Hundred Four Thousand Nine Hundred Dollars ($904,900.00) for the construction of the foundation for the Main Building of said Charity Hospital.

9. That on or about April 14, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant Herman T. Makofsky offered and submitted and caused to be offered and submitted a bid to the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, in the sum of Nine Hundred Five Thousand Three Hundred Fifty Dollars ($905,350.00) for the construction of the foundation for the Main Building of said Charity Hospital.

10. That on or about April 14, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant Lionel F. Favret offered and submitted and caused to be offered and submitted a bid to the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, in the sum of Nine Hundred Eight Thousand Dollars ($908,000.00) for the construction of the foundation for the Main Building of said Charity Hospital.

11. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant R. P. Farnsworth & Co., Inc., paid to the New Orleans Chapter, Associated General Contractors of America, Inc., Eight Thousand Two Hundred Ninety-two Dollars ($8,292.00), of which amount Seven Thousand Six Hundred Twenty Dollars ($7,620.00) had been added to the amount of its said bid on the foundation for the Main Building of Charity Hospital, and paid to it in part from funds of the United States of America out of appropriations aforesaid.

12. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to Cald-

well Bros. & Hart and W. Horace Williams Co., Inc., the sum of Eight Hundred Forty Dollars ($840.00).

13. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to Doullut and Ewin, Inc., the sum of Eight Hundred Forty Dollars ($840.00).

14. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to Boh & Lagarde the sum of Eight Hundred Forty Dollars ($840.00).

15. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to Burkes Bros. the sum of Eight Hundred Forty Dollars ($840.00).

16. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to Herman T. Makofsky the sum of Eight Hundred Forty Dollars ($840.00).

17. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to Lionel F. Favret, the sum of Eight Hundred Forty Dollars ($840.00).

18. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to Pittman Bros. Construction Company the sum of Eight Hundred Forty Dollars ($840.00).

19. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to W. F. Jackson Company the sum of Eight Hundred Forty Dollars ($840.00).

IV.

And so the Grand Jurors aforesaid, upon their oaths aforesaid do present and charge that the said defendants, together with divers other persons whose names are to the Grand Jurors unknown and therefore not herein mentioned throughout the period of time and at the places and in the manner and form aforesaid unlawfully, wilfully, knowingly and feloniously did conspire, combine, confederate and agree together and with each other to defraud the United States and to commit an offense against the United States and did do acts to effect the object of said conspiracy in violation of Section 88 of Title 18 United States Code, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count Two.

And the Grand Jurors aforesaid on their oaths aforesaid do further present and charge that:

New Orleans Chapter, Associated General Contractors of America, Inc., a Louisiana corporation, with its principal place of business in New Orleans, Louisiana;

R. P. Farnsworth & Co., Inc., a Delaware corporation, with its principal place of business in New Orleans, Louisiana;

W. Horace Williams Co., Inc., a Louisiana corporation, with its principal place of business in New Orleans, Louisiana;

Doullut & Ewin, Inc., a Louisiana corporation, with its principal place of business in New Orleans, Louisiana;

Herman T. Makofsky;
Lionel F. Favret;
Henry Boh;
Arthur P. Boh;
Arthur Lagarde;
Summa Caldwell;
Monte E. Hart;
Theodore A. Pittman;
Olin J. Farnsworth;
W. Horace Williams;
James P. Ewin;
John V. Burkes; and
Robert T. Burkes,

the defendants herein, throughout the period beginning on or about the 14th day of April, 1937, and continuing until on or about the 20th day of August, 1937, at New Orleans, in the Parish of Orleans, in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this Court, did knowingly, wilfully and unlawfully and with intent to defraud the United States,

divert, attempt to divert, and assist in diverting for the benefit of the said defendants and W. F. Jackson Company certain monies the exact amount of which is to the Grand Jurors unknown and therefore not herein set forth, allocated out of an appropriation under the authority of the Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act, fiscal year 1936, and the First Deficiency Appropriation Act of 1936, for the purpose of constructing certain buildings in the City of New Orleans, Louisiana, for the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, to-wit: the foundation for the Main Building of the said Charity Hospital, said project being known as Docket No. 4529 R and 4529 D, the cost of which project was financed in part out of appropriations aforesaid by the Federal Emergency Administration of Public Works, an agency of the United States of America, the said defendants and W. F. Jackson Company being then and there persons not entitled to any benefit under the provisions of the said Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act, fiscal year 1936, and the First Deficiency Appropriation Act of 1936, that is to say, that they the said defendant general contractors, being the only bidders on the project aforesaid, did wilfully and unlawfully add to their individual bids, which were to be submitted in connection with the project aforesaid, prior to their submission, certain agreed amounts which were each composed of sums, portions of which were to be collected and were collected by the successful bidder out of the appropriations aforesaid and were to be paid and were paid by the successful bidder to the New Orleans Chapter, Associated General Contractors of America, Inc., and by said Chapter distributed to the said defendants and W. F. Jackson Company all for the purpose and with the intent of obtaining funds from the said allocation and appropriation of monies aforesaid, for

the use and benefit of the said defendants and W. F. Jackson Company, persons not entitled thereto and in violation of Section 9 of the Emergency Relief Appropriation Act of 1935 (Public Resolution No. 11, 74th Congress); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

RENE A. VIOSCA,
United States Attorney.
J. SKELLY WRIGHT,
Assistant United States Attorney.
TOM C. CLARK,
Special Assistant to the Attorney General.
THOMAS J. MURPHY,
Special Assistant to the Attorney General.

A True Bill.

New Orleans, La., Dec. 2, 1939.

CHAS. R. MATTHEWS,
Foreman.

32 CAPIAS FOR NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

Bond for $1000.00.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of New Orleans Chapter, Associated General Contractors of America, Inc., and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

33 CAPIAS FOR R. P. FARNSWORTH & CO., INC.

Bond of $1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of R. P. Farnsworth & Co., Inc., and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Section. 9, etc.), and to be otherwise dealt with according to law.

Witness; the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

34 CAPIAS FOR W. HORACE WILLIAMS CO., INC.

Bond of $1,000.00.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of W. Horace Williams Co., Inc., and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Sec. 9, etc.), and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

35 CAPIAS FOR DOULLUT & EWIN, INC.

$1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Doullut & Ewin, Inc., and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

36 CAPIAS FOR HERMAN T. MAKOFSKY.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Herman T. Makofsky and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer

to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

37 MARSHAL'S RETURN ON CAPIAS FOR HERMAN T. MAKOFSKY.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named Herman T. Makofsky at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

38 CAPIAS FOR LIONEL F. FAVRET.

$1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Lionel F. Favret and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

39 MARSHAL'S RETURN ON CAPIAS FOR LIONEL F. FAVRET.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named Lionel F. Favret at P. O. Bldg.

in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

40 CAPIAS FOR HENRY BOH.

Bond of $1,000.00.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Henry Boh and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Sec. 9, etc.), and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

41 MARSHAL'S RETURN ON CAPIAS FOR HENRY BOH.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named Henry Boh at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

42 CAPIAS FOR ARTHUR P. BOH.

Bond of $1,000.00.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Arthur P. Boh and him have before our District Court of the United States for the Eastern District of

Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Sec. 9, etc.) and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

43 MARSHAL'S RETURN ON CAPIAS FOR ARTHUR P. BOH.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named Arthur P. Boh at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

44 CAPIAS FOR ARTHUR LAGARDE.

$1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Arthur Lagarde and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

45 MARSHAL'S RETURN ON CAPIAS FOR ARTHUR LAGARDE.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939. I executed the same by ar-

resting the within named Arthur Lagarde at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Bond of $1,000.00.

46 CAPIAS FOR SUMMA CALDWELL.

Bond for $1,000.00.

District Court of the United States of America.
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Summa Caldwell and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

47 MARSHAL'S RETURN ON CAPIAS FOR SUMMA CALDWELL.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named Summa Caldwell at P. O. Bldg. in the City of New Orleans, La., and have hi body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

48 CAPIAS FOR MONTE E. HART.

Bond of $1,000.00.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Monte E. Hart and him have before our District Court of the United States for the Eastern District of

Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

49 MARSHAL'S RETURN ON CAPIAS FOR MONTE E. HART.

No. 19843.

Capias.

Received at New Orleans, Louisiana, on the 2nd day of December, 1939, and on the 4th day of December, 1939, I return same unexecuted for the reason that the within named Monte E. Hart appeared voluntarily before the United States Commissioner and made bond before same could be executed.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

50 CAPIAS FOR THEODORE A. PITTMAN.

Bond of $1,000.00.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Theodore A. Pittman and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

51 MARSHAL'S RETURN ON CAPIAS FOR THEODORE A. PITTMAN.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named Theodore A. Pittman at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

52 CAPIAS FOR OLIN J. FARNSWORTH.

Bond of $1,000.00.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Olin J. Farnsworth and him have before our District Court of the United States for the Eastern Dis-

trict of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

53 MARSHAL'S RETURN ON CAPIAS FOR OLIN J. FARNSWORTH.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named Olin J. Farnsworth at P. O. Bldg, in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

54 CAPIAS FOR W. HORACE WILLIAMS.

$1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of W. Horace Williams and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

55 MARSHAL'S RETURN ON CAPIAS FOR W. HORACE WILLIAMS.

No. 19843.

Capias.

Received at New Orleans, Louisiana, on the 2nd day of December, 1939, and on the 8th day of December, 1939, I return same unexecuted for the reason that the within

named W. Horace Williams appeared voluntarily before the United States Commissioner and made bond before same could be executed.

H. C. RICHARDSON,
U. S. Marshal,
By P. A. GANDE,
Deputy.

56 CAPIAS FOR JAMES P. EWIN.

$1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of James P. Ewin and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

57 MARSHAL'S RETURN ON CAPIAS FOR JAMES P. EWIN.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named James P. Ewin at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

58 CAPIAS FOR JOHN V. BURKES.

$1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of John V. Burkes and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an

indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9th), etc., and to be otherwise dealt with accord to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

59 MARSHAL'S RETURN ON CAPIAS FOR JOHN V. BURKES.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named John V. Burkes at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

60 CAPIAS FOR ROBERT T. BURKES.

$1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Robert T. Burkes and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk.
By N. H. LEWIS,
Deputy Clerk.

61 MARSHAL'S RETURN ON CAPIAS FOR ROBERT T. BURKES.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by ar-

resting the within named Robert T. Burkes at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

62 DISMISSAL OF COUNT I.

(Number and Title Omitted.)

Extract from the Minutes.

November Term, 1939.

New Orleans, Monday, January 15th, 1940.

Court met pursuant to adjournment:

Present: Hon. Wayne G. Borah, Judge.

J. Skelly Wright, Esq., Asst. United States Attorney, this day appeared in open Court and stated to the Court that the Government no longer desired to prosecute the defendants, New Orleans Chapter, Associated General Contractors of America, R. P. Farnsworth & Co., Inc., W. Horace Williams Co., Inc., Doullut & Ewin, Inc., Herman T. Makofsky, Lionel F. Favret, Henry Boh, Arthur P. Boh, Summa Caldwell, Monte E. Hart, Theodore A. Pittman, Olin J. Farnsworth, W. Horace Williams, James P. Ewin, John V. Burkes and Robert T. Burkes as regards Count 1 of the Indictment found and presented against them.

Whereupon, and on due consideration thereof, it is Ordered that Count 1 of the Indictment be and the same is hereby dismissed as regards each of the defendants herein, and no further.

PLEAS OF "NOLO CONTENDERE."

(Number and Title Omitted.)

New Orleans Chapter, Associated General Contractors of America, Inc., R. P. Farnsworth & Co., Inc., W. Horace Williams Co., Inc., Doullut & Ewin, Inc., Herman T. Makofsky, Lionel F. Favret, Henry Boh, Arthur P. Boh, Summa Caldwell, Monte E. Hart, Olin J. Farnsworth, W. Horace Williams, James P. Ewin, John V. Burkes and Robert T. Burkes, defendants herein, being this day arraigned at the Bar of the Court, appearing individually and represented by their counsel of record, Eberhard P. Deutsch, Esq., waived the formal reading of the Indictment found and presented against them for violation of Section 9 of the Emergency Relief Appropriation Act of 1935 (Public Resolution No. 11, 74th Congress), and they and each of them entered a plea of "Nolo Contendere" to Count 2 thereof, Count 1 having been dismissed as to each of the defendants on motion of Asst. United States Attorney.

Whereupon, it Ordered that their said pleas of "Nolo Contendere" as to Count 2 be recorded, and it is done accordingly.

63 PLEA OF "NOLO CONTENDERE" AS TO THEODORE A. PITTMAN.

Theodore A. Pittsman, defendant herein, being this day arraigned at the Bar of the Court, appeared in proper person and represented by his counsel of record, G. Wray Gill, Esq., waived the formal reading of the Indictment found and presented against him for violation of Section 9 of the Emergency Relief Appropriation Act of 1935 (Public Resolution No. 11, 74th Congress), and entered a plea of "Nolo Contendere" to Coount 2 thereof, Count 1 having been dismissed on motion of Asst. United States Attorney.

Whereupon, it is Ordered that his said plea of "Nolo Contendere" as to Count 2 be recorded, and it is done accordingly.

64 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
New Orleans Chapter, Associated General Contractors of America, Inc., et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15 day of January, 1940, came the United States Attorney, and the defendant New Orleans Chapter, Asso-

ciated General Contractors of America, Inc., appearing through its counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on its plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether it has anything to say why judgment should not be pronounced against it, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Thousand Dollars ($2,000.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
United States District Judge.

65 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
R. P. Farnsworth & Co., Inc., et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant R. P. Farnsworth & Co., Inc., appearing through its counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on its plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether it has anything to say why judgment should not be pronounced against it, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

66 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
W. Horace Williams Co., Inc., et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant W. Horace Williams Co., Inc., appearing through its counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on its plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether it has anything to say why judgment should not be pronounced

against it, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00), and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

67 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Doullut & Ewin, Inc., et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant Doullut & Ewin, Inc., appearing through its counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on its plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether it has anything to say why judgment should not be pronounced against it, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

68 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Herman T. Makofsky, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant Herman T. Makofsky appear-

ing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00), and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
United States District Judge.

69 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Lionel F. Favret, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant Lionel F. Favret, appearing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00), and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

70 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Henry Boh, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant Henry Boh appearing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed and the defendant having been now asked whether he has anything to say why judgment should not be pronounced

against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00), and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

71 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Arthur P. Boh, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant Arthur P. Boh, appear-

ing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00); and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

72 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal
Summa Caldwell, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15 day of January, 1940, came the United States Attorney, and the defendant Summa Caldwell, appearing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendants having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00), and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
United States District Judge.

73 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Monte E. Hart, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant Monte E. Hart, appearing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed and the defendant having been now asked whether he has anything to say why judgment should not be pronounced

against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00), and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

74 JUDGMENT AND COMMITMENT.

Filed Jan. 15, 1940.

District Court of the United States, Eastern District,
New Orleans Division.

United States
vs. No. 19843 Criminal.
Theodore A. Pittman, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9, Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney and the defendant Theodore A. Pitt-

man, appearing in proper person, and through his counsel, G. Wray Gill, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

75 JUDGMENT AND COMMITMENT.

Filed Jan. 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Olin J. Farnsworth, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9, Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant Olin J. Farnsworth, appearing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

76 JUDGMENT AND COMMITMENT.

Filed Jan. 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
W. Horace Williams, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9, Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant W. Horace Williams, appearing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him,

and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

77 JUDGMENT AND COMMITMENT.

Filed Jan. 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
John V. Burkes, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9, Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant, John V. Burkes, ap-

pearing in proper person, and through his counsel, Eber-Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

78 JUDGMENT AND COMMITMENT.

Filed Jan. 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Robert T. Burkes, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9, Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United State Attorney, and the defendant, Robert T. Burkes, appearing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

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79 OPINION.

Filed December 31st, 1940.

United States District Court, Eastern District of Louisiana.

United States of America on Relation of Samuel Ostrager and Samuel Ostrager in His Own Behalf,

vs. No. 259, Civil Action.

New Orleans Chapter, Associated General Contractors of America, Inc., a Louisiana Corporation, W. Horace Williams Co., Inc., a Louisiana Corporation, Doullut and Ewin, Inc., a Louisiana Corporation, R. P. Farnsworth & Co., Inc., a Delaware Corporation, Herman T. Makofsky, Lionel F. Favret, Henry Boh, Arthur P. Boh, Summa Caldwell, Monte E. Hart, Theodore A. Pittman, Olin J. Farnsworth, W. Horace Williams, James P. Ewin, John V. Burkes, Robert T. Burkes and Arthur Lagarde.

Alexander H. Schullman,
Orloff & Katz,
Katz & Amato,
Attorneys for Plaintiff

Deutsch & Kerrigan,
Attorneys for Defendants.

Norman & Rouchell,
Robert A. Pascal,
Attorneys for Arthur Lagarde, a Defendant.

BORAH, District Judge:

This action was filed on February 1, 1940. The seventeen defendants named herein are the same as those named in the indictment in the case of United States of America vs. New Orleans Chapter, Associated General Contractors of America, Inc., et al, Criminal No. 19843, which was returned in this District and Division on December 2, 1939. The defendants under the indictment, with the exception of Arthur Lagarde as to whom a nolle prosequi was entered, were arraigned on January 15, 1940, and, on pleas of nolo contendere, were fined by the Court, $2,000 for the New Orleans Chapter, Associated General Contractors of America, Inc., and $200 for each of the other defendants.

The complaint in the instant case charges the defendants with having committed the same act for which they were indicted, i. e., of having, with intent to defraud the United States, diverted, attempted to divert, and assisted in diverting for the benefit of the defendants and W. F. Jackson Company certain monies allocated out of the Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act, fiscal year 1936, and the First Deficiency Appropriation Act of 1936, for the purpose of constructing certain buildings in the City of New Orleans, Louisiana, for the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, to-wit: the foundation for the Main Building of the said Charity Hospital. The complaint alleges, as did the indictment, that the defendants, being the only bidders on this project, added certain agreed amounts to their bids, portions of which amounts were to be collected and were collected by the successful bidder out of the above mentioned appropriations and were to be paid and were paid to the New Orleans Chapter, Associated General Contractors of America, Inc., and by said Chapter distributed to the defendants and W. F. Jackson Company. In addition, the

complaint alleges that the defendants formed a conspiracy to defraud the United States and charges that in furtherance of the conspiracy the defendants, at a meeting of the Association, adopted a resolution requiring the members to add to bids thereafter submitted the Association fees then in force, regardless of whether such bids were for Government work or not, and it alleges that the defendants agreed that they would add in excess of $7,500 to their bids on the Charity Hospital foundation; it alleges the amount that each of the defendants bid on this job; it alleges that the defendants executed certificates certifying that their bids were genuine and not sham or collusive; and it alleges that the amount of which the Government was defrauded was $7,620. While all of these additional allegations, except that regarding the certificate, were contained in the first count of the indictment as to which a nolle prosequi was entered, none of them were contained in the second count under which the defendants were fined by the Court. However, it is not believed that this makes any difference as the offense alleged in complaint and that alleged in the second count of the indictment are really one and the same; that is, that the United States was defrauded by additions made to the bids for the construction of the foundation of the Charity Hospital.

The relator in the instant case predicates his right to bring this action on Sections 231, 232, 233, 234 and 235 of Title 31, United States Code Annotated. The type of action allowed under these sections is known as a qui tam action. United States vs. Griswold, 24 F. 361. These sections provide, in effect, that, where a person has defrauded the Government by the presentation of a false claim, a suit can be brought and carried on by any person, as well for himself as for the United States, to collect a forfeiture in the sum of $2,000 and, in addition, double the amount of damages which the United States may have

sustained, and that the person bringing the suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of the forfeiture as well as one-half the amount of the damages he shall recover and collect, the other half going to the United States. The relator is here seeking judgment in the amount of $15,240, which is double the amount of which he claims the United States has been defrauded, plus judgment against each of the defendants in the amount of $2,000.

The defendants have answered and all save Arthur Lagarde, who filed a separate answer, have set up a counter-claim for libel, alleging as the basis therefor, that plaintiff in his complaint in the present action, libelled the defendants.

The defendants have now in advance of trial provoked a hearing and the defendants, other than Lagarde have requested the Court to determine the sufficiency of the first and second defenses pleaded in their answer and have moved for a separate trial on their counter-claim. Heard also was plaintiff's motion to dismiss counter-claim of defendants, to have counter-claim stricken and to strike from answer all allegations contained in the second defense and certain allegations of the third defense of defendants' answer. The sufficiency of the first defense pleaded in the answer of Arthur Lagarde was also presented for determination.

The first defense pleaded in the answers is that the complaint fails to state a claim upon which relief can be granted. The second defense pleaded is that the instant proceeding is in effect putting defendants in double jeopardy in violation of the Fifth Amendment to the Constitution of the United States.

There is no merit in the contention that this action should be dismissed for failure to state a claim upon which relief can be granted. However, dismissal as to all defendants with the exception of Lagarde is warranted on other grounds.

There can be slight doubt that a proceeding such as the present one, while civil in form, is criminal in its nature and effect. If this be true it follows that the action in the instant case cannot be maintained, for to allow it to be maintained would be to submit the defendants to double jeopardy.

In United States vs. Shapleigh, 54 F. 126, the Court held that in a suit under Rev. St. Section 3490 (31 U. S. C. A., Section 231) to recover the double damages and forfeiture prescribed against any one presenting a false or fraudulent claim against the United States, the Government must prove its case beyond a reasonable doubt, for the proceeding, while civil in form is criminal in its nature and effect. The Court said, at page 134:

"The United States might have maintained a civil suit for the single damages it sustained, if any, from the wrongful acts of the defendants charged in this complaint without establishing its case beyond a reasonable doubt. Such a suit would have been a civil suit in its nature and purpose as well as in its form. The action at bar is a civil suit in form; but when, under the form of this civil suit, the government sought to punish this defendant for felonies by recovering the penalty of double damages and $2,000 for each offense, it made this proceeding criminal in its nature and purpose, and invoked the application to it of the rules of evidence applicable to criminal trials."

To the same effect, though involving other statutes, see Regan vs. United States, 183 F. 293; Atchison T. & S. F. Railway Co. vs. United States, 173 F. 194.

In United States ex rel. Knight vs. Mellon, et al, 4 F. Supp. 947, (affirmed 71 F. (2d) 1021) at page 949, the Court said:

"Counsel for the plaintiffs have contended that sections 3490, 3491, Rev. St. (31 U. S. C. A., Sec. 231, 232) are remedial statutes, and, as such, are entitled to a quite liberal construction, as opposed to the strict construction to be given a penal statute. With this contention we are unable to agree. The statute is plainly penal in its nature, and is not to be enlarged by implication."

Thus, it will be seen that in cases brought on the relation of an individual, as well as those brought by the Government alone, the Courts have held that the statute under which the instant case is brought is penal in nature, though the action brought is civil in form.

The Courts have been consistent in holding that where a person has been subjected to a criminal prosecution and either convicted or acquitted that another suit, though civil in form, which would subject him to a further penalty for the same acts, cannot be brought against him.

In United States vs. Chouteau, 102 U. S. 603, a distiller and his sureties were sued on a bond, one of the breaches of which was that the distiller had removed spirits from his distillery without first paying the tax thereon. Previous to this suit, two indictments had been found against the distiller on the same grounds, and, on recommendation of the Attorney General, the Government had accepted a specified sum in compromise and satisfaction of the indictments, which thereupon were dismissed and abandoned. The Court held that the compromise was the same in principle as a conviction in the criminal proceeding and that the action was barred. At page 611, the Court said:

"Admitting that the penalty may be recovered in a civil action as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its char-

acter is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. . . . He has been punished . . ., and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense."

In the case of United States vs. McKee, 4 Dill. 128, 26 Fed. Cas., page 1116, No. 15688, the defendant had been indicted, convicted, and punished for conspiring with others to defraud the United States by unlawfully removing distilled spirits from their distilleries without the payment of taxes. It was held by the Court that this conviction was a bar to a civil suit to recover the penalty of double the amount of taxes of which the Government had been defrauded by means of the conspiracy, the transactions in both cases being the same. See also, to the same effect, United States vs. Gates, 25 Fed. Cas., page 1263, No. 15,191; Coffey vs. United States, 116 U. S. 436.

Upholding generally this same doctrine is Helvering vs. Mitchell, 303 U. S. 391. This case held that an acquittal of a charge of wilfully attempting to evade the income tax does not bar assessment and collection of a 50% addition to the tax, and that the doctrine of double jeopardy is inapplicable because the 50% addition to the tax is not primarily punitive but is a remedial sanction imposed as a safeguard for protection of the revenue and to reimburse the Government for expense and loss resulting from the taxpayer's fraud. However, Justice Brandeis says, at page 397:

"That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. Stone vs. United States, 167 U. S. 178; Murphy vs. United States, 272 U. S.

630. Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment, whether the verdict was an acquittal or conviction."

Not precisely in point but quite analogous is United States vs. LaFrance, 282 U. S. 568, 51 Sup. Ct. 278. This was a suit by the United States to collect retail liquor dealers' taxes imposed by laws in effect before the National Prohibition Act but doubled in amount as provided by section of the Prohibition Act where persons sold liquor in contravention of the law. Prior to the commencement of the action, respondent had been convicted and fined upon an information filed by the United States under the Prohibition Act, charging him with the same unlawful sales of intoxicating liquor set forth in the petition as the basis for the imposition of the taxes and penalties sought to be recovered. The Court rested its decision, that this action was barred by the prior conviction, not on the general grounds of double jeopardy, at which it strongly hinted, but upon the provisions of the Willis-Campbell Act (27 U. S. C. A., Sec. 3) that, if any act was a violation of laws in effect before the Prohibition Act and also of the Prohibition Act or of the Willis-Campbell Act, a conviction for such act or offense under one should be a bar to prosecution therefor under the other. In reaching this conclusion, however, the Court was forced to hold that the exaction in question, the double tax, was not a true tax but a penalty involving the idea of punishment for infraction of the law. And Justice Sutherland said, at page 575:

"But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding,

although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action."

That the acts for which Section 231 of Title 31 allows actions to be brought are declared to be crimes seems clear enough. Section 231 provides: "Any person . . . who shall do or commit any of the acts prohibited by any of the provisions of section 80 of Title 18, shall forfeit, etc." Section 80, in defining the acts of making false claims, etc., provides that persons guilty of such acts shall be fined or imprisoned, or both. This would seem to be a declaration that such acts are crimes.

In the light of the foregoing determinations the present action should be dismissed as to all of the defendants save Arthur Lagarde.

Plaintiff's motion to dismiss the counter-claim of defendants presents the next issue of importance. Plaintiff's motion in the main is predicated on the well established principal that an action for libel based upon alleged defamatory pleadings in the course of a judicial proceeding, may not be maintained until the termination of the judicial proceeding. Especially where as here the parties in the libel action are the very same parties in the judicial proceeding. This is the law of Louisiana. Wolf vs. Royal Ins. Co., et al, 130 La. 679; Manuel vs. Deshotels, et al, 160 La. 652; Robinson Mercantile Co. vs. Freeman (La. App. 1937), 172 So. 797; Thompson vs. Gosserand, 128 La. 1029.

The claim for damages for libel comes in case only after the litigant making the charges has been given an opportunity to prove them in the suit in which they are made. Howard vs. Coyle, 163 La. 257. And since defendants' cause of action for libel cannot accrue until after the termination of the instant proceeding it follows that defendants' counter-claim has been prematurely filed and same is hereby dismissed.

Defendants' motion for a separate trial on their counter-claim accordingly should be overruled, together with plaintiff's motion to have counter-claim stricken and to strike from answer certain allegations with respect to defendants' second and third defenses.

New Orleans, Louisiana, December 31, 1940.

WAYNE G. BORAH,
United States District Judge.

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88 JUDGMENT.

Filed January 7th, 1941.

United States District Court, Eastern District of Louisiana, New Orleans Division.

United States of America on Relation of Samuel Ostrager and Samuel Ostrager in His Own Behalf,

vs. No. 259, Civil Action.

New Orleans Chapter, Associated General Contractors of America, Inc., a Louisiana Corporation, W. Horace Williams Co., Inc., a Louisiana Corporation, Doullut and Ewin, Inc., a Louisiana Corporation, R. P. Farnsworth & Co., Inc., a Delaware Corporation, Herman T. Makofsky, Lionel F. Favret, Henry Boh, Arthur P. Boh, Summa Caldwell, Monte E. Hart, Theodore A. Pittman, Olin J. Farnsworth, W. Horace Williams, James P. Ewin, John V. Burkes, Robert T. Burkes and Arthur Lagarde.

Alexander H. Schullman,
Orloff & Katz,
Katz & Amato,
Attorneys for Plaintiff.

Deutsch & Kerrigan,
Attorneys for Defendants.

Norman & Rouchell,
Robert A. Pascal,
Attorneys for Arthur Lagarde, a Defendant.

This matter was heard and submitted on September 23rd, 1940, on certain defenses contained in the answers filed by defendants and on plaintiffs' motion to dismiss defendants' counter-claim, to have the counter-claim stricken, and to strike from the answer all allegations contained in defendants' second defense and certain of the allegations of defendants' third defense, and was also heard on defendants' motion for a separate trial of their counter-claim.

Now, therefore, after due consideration, and for the written reasons on file,

It is Ordered, Adjudged and Decreed that:

1. Defendants' defense of failure to state a claim upon which relief can be granted, is overruled.

2. Defendants' defense of double jeopardy with reference to all defendants, other than Arthur Lagarde, is maintained, and this suit is dismissed with costs as to all defendants, other than the said Arthur Lagarde.

3. Defendants' counter-claim is dismissed.

4. Defendants' motion for a separate trial on their counter-claim is also overruled.

5. Plaintiffs' motion to strike defendants' counterclaim and to strike certain allegations with reference to defendants' second and third defenses, is overruled.

Approved.

WAYNE G. BORAH,
U. S. Dist. Judge.

NOTICE OF APPEAL ON BEHALF OF PLAINTIFF.

90 Filed March 19, 1941.

United States of America.

District Court of the United States, Eastern District of Louisiana, New Orleans Division.

United States of America on Relation of Samuel Ostrager and Samuel Ostrager in His Own Behalf,
vs. No. 259, Civil Action.
New Orleans Chapter, Associated General Contractors of America, Inc., a Louisiana Corporation, et al.

Notice of Appeal to Circuit Court of Appeals, Fifth Circuit.

To the Defendants in the Above Action, and Their Counsel:

Notice Is Hereby Given that Samuel Ostrager, relator and plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit, from that part of the decree of the above Court, which maintains defendants' defense of double jeopardy with reference to all

defendants, other than Arthur Lagarde, and which dismisses suit with costs as to all defendants, other than Arthur Lagarde, entered in this action on January 7, 1941.

Dated: March 8, 1941.

ALEXANDER H. SCHULLMAN,
ORLOFF & KATZ, and
KATZ AND AMATO,
By ALEXANDER H. SCHULLMAN,
Attorneys for Appellant.

APPEAL BOND ON BEHALF OF PLAINTIFF.

91 Filed March 28, 1941.

Know All Men By These Presents: That we, Samuel Ostrager, as principal, and New Amsterdam Casualty Company, as surety, are held and firmly bound unto A. Dallam O'Brien, Jr., Clerk, U. S. District Court, Eastern District of Louisiana, in the full and just sum of Two Hundred and Fifty Dollars to be paid to the said A. Dallam O'Brien, Jr., Clerk, U. S. Dist. Court, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 26th day of March, 1941, in the year of our Lord one thousand nine hundred and forty-one.

Whereas, lately at a session of the United States District Court, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court, between United States of America on relation of Samuel

Ostrager and Samuel Ostrager in his own behalf against New Orleans Chapter, Associated General Contractors of America, Inc., etc., et als, a decree was rendered against the said United States of America on relation of Samuel Ostrager and Samuel Ostrager in his own behalf, and the said United States of America on relation of Eamuel Ostrager and Samuel Ostrager in his own behalf having given a notice of appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and notice of appeal having been directed to all defendants citing and admonishing them to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date of filing of Notice of Appeal.

Now, the condition of the above obligation is such; That if the said Samuel Ostrager shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

.....,

.....,

.....

SAMUEL OSTRAGER, (Seal)

Per KATZ & AMATO, (Seal)

(Sgd.) J. J. AMATO, (Seal)

Counsel of Record.

NEW AMSTERDAM CASUALTY CO.,

By (Sgd.) LEON IRWIN, JR.,

Attorney-in-Fact.

Approved by—

(Sgd.) WAYNE G. BORAH,

Judge.

NOTICE OF APPEAL ON BEHALF OF DEFENDANTS.

92 Filed March 31, 1941.

In the District Court of the United States in and for the Eastern District of Louisiana, New Orleans Division.

United States of American on Relation of Samuel Ostrager and Samuel Ostrager in His Own Behalf,
vs. No. 259, Civil Action.
New Orleans Chapter, Associated General Contractors of America, Inc., et al.

Notice is hereby given that New Orleans Chapter, Associated General Contractors of America, Inc., Doullut & Ewin, Inc., R. P. Farnsworth & Company, Inc., W. Horace Williams Company, Inc., Arthur P. Boh, Henry Boh, Burkes Bros, John V. Burkes, Robert T. Burkes, Caldwell Bros. & Hart, Summa Caldwell, Verne Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Pittman Bros. Construction Company, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams, defendants, hereby appeal to the Circuit Court of Appeals for the Fifth Circuit from those parts of the judgment entered in this action on January 7, 1941, which dismissed defendants' Counter-claims and which overruled defendants' defense that the complaint fails to state a claim against defendants upon which relief can be granted.

R. EMMETT KERRIGAN,
(R. Emmett Kerrigan)
of
DEUTSCH AND KERRIGAN,
Attorneys for Defendants.

17th Floor Hibernia Bank Bldg.,
New Orleans.

93 APPEAL BOND.

Filed March 31st, 1941.

(Title Omitted.)

Know All Men By These Presents: That New Orleans Chapter, Associated General Contractors of America, Inc., Doullut & Ewin, Inc., R. P. Farnsworth & Company, Inc., W. Horace Williams Company, Inc., Arthur P. Boh, Henry Boh, Burkes Bros., John V. Burkes, Robert T. Burkes, Caldwell Bros. & Hart, Summa Caldwell, Verne Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Pittman Bros. Construction Company, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams, as principals, and Continental Casualty Company, as surety, are held and firmly bound unto the Clerk of the United States District Court for the Eastern District of Louisiana in the sum of two hundred fifty ($250.00) dollars, to be paid to said Clerk, his successors or assigns, to which payment we bind ourselves, our successors and assign, jointly and severally.

Sealed with our seals and dated this 29th day of March, 1941.

Whereas on January 7, 1941, in the above numbered and entitled action in the District Court of the United States for the Eastern District of Louisiana, a certain judgment was rendered, and the above named principals have duly filed a notice of appeal from certain parts of said judgment;

Now, the condition of this obligation is that if said principals shall prosecute their appeal with effect and pay all costs if the appeal is dismissed or the judgment af-

firmed, or such costs as the Appellate Court may warrant. if the judgment is modified, then this obligation to be void, otherwise to remain in full force and effect.

NEW ORLEANS CHAPTER, ASSOCIATED CONTRACTORS OF AMERICA, INC.,
DOULLUT & EWIN, INC.,
R. P. FARNSWORTH & COMPANY, INC.,
W. HORACE WILLIAMS COMPANY, INC.,
ARTHUR P. BOH,
HENRY BOH,
BURKES BROS.,
JOHN V. BURKES,
ROBERT T. BURKES,
CALDWELL BROS. & HART;
SUMMA CALDWELL,
VERNE CALDWELL,
MONTE E. HART,
JAMES P. EWIN,
OLIN J. FARNSWORTH,
LIONEL F. FAVRET,
PITTMAN BROS. CONSTRUCTION COMPANY,
THEODORE A. PITTMAN,
HOUSTON C. PITTMAN,
EVERETT PITTMAN,
HERMAN T. MAKOFSKY and
W. HORACE WILLIAMS,
By DEUTSCH AND KERRIGAN,
(Deutsch and Kerrigan)
Attorneys.
CONTINENTAL CASUALTY COMPANY,
By EBERHARD P. DEUTSCH,
Attorney-in-Fact.

95 POWER OF ATTORNEY.

Filed March 31st, 1941.

Continental Casualty Company,
Chicago.

Certificate of Authority Individual Attorney-in-Fact.

Know All Men By These Presents: That the Continental Casualty Company, a corporation duly organized under the laws of the State of Indiana, and having its general office in the City of Chicago, and State of Illinois, hath made, constituted and appointed, and does by these presents make, constitute and appoint Ederhard P. Deutsch, of New Orleans, Louisiana, its true and lawful Attorney-in-Fact with full power and authority hereby conferred to sign, seal and execute in its behalf bonds, undertakings and other obligatory instruments of similar nature as follows: Any and all Fidelity and Surety bonds in penalty not exceeding Twenty-five Thousand Dollars ($25,000.00) each, and to bind the Continental Casualty Company thereby as fully and to the same extent as if such instruments were signed by the duly authorized officers of the Continental Casualty Company and all the acts of said Attorney, pursuant to the authority hereby given are hereby ratified and confirmed.

This Power of Attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the Company at a meeting duly called and held on the 6th day of January, 1937.

"Article XI—Surety Bonds and Undertakings.

Section 2. Appointment of Attorney-in-Fact. The President or any Vice-President may, from time to time, ap-

point by written certificates Attorneys-in-Fact to act in behalf of the Company in the execution of policies of insurance, bonds, undertakings and other obligatory instruments of like nature. Such Attorneys-in-Fact, subject to the limitations set forth in their respective certificates of authority shall have full power to bind the Company by their signature and execution of any such instrument and to attach the seal of the Company thereto. The President or any Vice-President or the Board of Directors may at any time revoke all power and authority prevously given to any Attorney-in-Fact."

In Witness Whereof, the Continental Casualty Company has caused these presents to be signed by its Vice-President and its corporate seal to be hereto affixed this 13th day of August, 1940.

CONTINENTAL CASUALTY COMPANY,
By ROLLIN M. CLARK,
(Seal) Vice-President.

State of Illinois,
County of Cook, ss:

On this 13th day of August, 1940, before me personally came Rollin M. Clark, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Chicago, State of Illinois; that he is a Vice-President of the Continental Casualty Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed pursuant to authority given by the Board of Directors of said corporation and that he signed his name thereto pursuant to like authority.

H. McCRILLUS,
(Notarial Seal) Notary Public.

My Commission expires April 9, 1944.

Certificate.

I, J. E. Payne, Assistant Secretary of the Continental Casualty Company, do hereby certify that the attached Power of Attorney dated August 13th, 1940, in behalf of Eberhard P. Deutsch, is a true and correct copy and that same is still in force.

In testimony whereof I have hereunto subscribed my name and affixed the corporate seal of the said Company this ..... day of ....., 19....

J. E. PAYNE,
Assistant Secretary.

MOTION TO SUBSTITUTE PARTY DEFENDANT.

96 Filed April 23rd, 1941.

(Number and Title Omitted.)

On motion of Katz and Amato, attorneys for the Plaintiff and on suggesting to this Honorable Court that:

1.

Defendant, Monte E. Hart, died on September 6, 1940, in the City of New Orleans.

2.

That a succession has been opened in the Civil District Court for the Parish of Orleans, State of Louisiana, bearing No. 236-640.

3.

That his wife, Mrs. Cora Buckman, widow of Monte E. Hart, has been appointed Testamentary Executrix on September 16, 1940, by the Honorable Walter A. Gleason, Judge in Section "D".

4.

It is further suggested to this Honorable Court that under rules of Civil Procedure for the District Courts of the United States and particularly Rule 25, your petitioner desires that the Testamentary Executrix, Mrs. Cora Buckman, widow of Monte E. Hart be substituted as proper party defendant for the late, Note E. Hart.

Wherefore, Movers pray that after due proceedings had, that this Honorable Court substitute Mrs. Cora Buckman, Testamentary Executrix of the Succession of the late Monte E. Hart, as proper party defendant in the above entitled and numbered cause.

(Sgd.) JACOB J. AMATO,
KATZ & AMATO,
(Katz & Amato)
Attorneys for Plaintiff.

1019 Carondelet Building,
New Orleans, Louisiana.

Served on Defendant Counsel, April 24, 1941.
(Sgd.) JACOB J. AMATO.

97 NOTICE OF MOTION.

To: Deutsch and Kerrigan, Esqs.,
Mr. Emmett R. Kerrigan,
Hibernia Bank Building,
New Orleans, Louisiana,
Attorneys for Defendants.

Please take notice, that the undersigned will bring the above motion for hearing before the Court of the Honorable Wayne Borah, Judge of the District Court of the United States in and for the Parish of Orleans, State of Louisiana, at the Post Office Building, New Orleans, Louisiana, on the 30th day of April, 1941, at 10 A. M. o'clock in the forenoon on that day or as soon thereafter as counsel can be heard.

(Sgd.) JACOB J. AMATO,
Attorney for Plaintiff.
KATZ & AMATO,
(Katz & Amato)
Attorneys at Law.

1019 Carondelet Bldg.,
New Orleans, Louisiana.

MOTION FOR SUBSTITUTION OF PARTIES.

98 Filed April 23, 1941.

(Number and Title Omitted.)

On motion of Katz and Amato, attorneys for the plaintiff, and on suggesting to this Honorable Court that:

1.

On January 10, 1941, Caldwell Bros. & Hart, in ordinary partnership, the defendant in the above cause and

numbered matter, filed a proceeding in the Civil District Court No. 238-169 for a judicial liquidation.

2.

That the ordinary partnership of Caldwell Bros. & Hart was composed of Summa Caldwell, of New Orleans, Verna Caldwell, of Erath, and Monte E. Hart, of New Orleans.

3.

That Summa Caldwell and Verna Caldwell each were the owners of one-fourth (¼) of the said partnership, and Monte E. Hart was the owner of the other one-half (½) of the said partnership.

4.

That a petition was filed by Mrs. Cora Buckman, widow of Monte E. Hartt, appointed Testamentary Executrix of the Succession of Monte E. Hart, bearing No. 236-640 in the Civil District Court for the said liquidation.

5.

That on January 13, 1941, Sidney Bourgeois and Louis H. Pilie were both appointed as joint liquidators by that Honorable Court.

6.

And that Warren Doyle, Donald Doyle, and the law firm of Odgen and Wood, and Edmond E. Talbot were also appointed by that Honorable Court as attorneys for the said liquidation.

7.

Your movers further suggest that under rules of Civil Procedure of the District Courts of the United States and in particular under Rule 25, your movers at this time suggest to this Honorable Court to substitute Sidney Bourgeois and Louis H. Pilie, joint liquidators, for Caldwell Bros. & Hart, ordinary partnership, as proper party defendants herein.

Wherefore, movers pray that after due proceedings had, that Sidney Bourgeois and Louis H. Pilie, joint liquidators of the judicial liquidation of Caldwell Bros. & Hart, ordinary partnership, be substituted as proper party defendants in the above cause and numbered matter.

(Sgd.) JACOB J. AMATO,
KATZ & AMATO,
Attorneys for Plaintiff.

1019 Carondelet Bldg.,
New Orleans, La.

Served on defendant counsel in person, on April 24, 1941.

(Sgd.) JACOB J. AMATO.

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99 NOTICE OF MOTION.

Filed April 23, 1941.

(Number and Title Omitted.)

To: Deutsch & Kerrigan, Esq.,
Mr. Emmett R. Kerrigan,
Hibernia Bank Building,

New Orleans, Louisiana,
Attorneys for Defendants.

Please take notice, that the undersigned will bring the above motion for hearing before the Court of the Honorable Wayne Borah, Judge of the District Court of the United States in and for the Parish of Orleans, State of Louisiana, at the Post Office Building, New Orleans, Louisiana, on the 30th day of April, 1941, at 10 A. M. o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

(Sgd.) JACOB J. AMATO,
Attorney for Plaintiff.
(Sgd.) KATZ & AMATO,
(Katz & Amato)
Attorneys at Law.

1019 Carondelet Bldg.,
New Orleans, Louisiana.

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100 EXHIBIT FILED IN DISTRICT COURT APRIL 30th, 1941.

State of Louisiana.

Civil District Court for the Parish of Orleans.

Letters Testamentary.

No. 236-640. Division "B".

Succession of Monte E. Hart.

Filed September 18th, 1940.

(Sgd.) JOHN B. SCANLAN,
Deputy Clerk.

To All Whom These Presents May Come—Greeting:

Whereas, Mrs. Cora Buckman, widow of Monte E. Hart, named and appointed Testamentary Executrix of the Last

Will and Testament of the late Monte E. Hart, Deceased, has applied to the Civil District Court for the Parish of Orleans by Petition praying said Court to grant Letters Testamentary therein.

Now Know Ye, That the said Mrs. Cora Buckman, widow of Monte E. Hart, is hereby authorized and empowered to collect all the goods and effects which are of said above named succession deceased, and to make a just inventory thereof, and all other lawful acts to do and perform as Testamentary Executrix of the said last Will and Testament.

Witness our hand and the Seal of said Court, at the City of New Orleans, this 18th day of September, in the year of our Lord one thousand nine hundred and Forty and the 165th of the Independence of the United States of America.

(Sgd.) WALTER L. GLEASON,
Judge.

A true copy.

(Sgd.) JNO. B. SCANLAN,
Deputy Clerk, Civil District Court, Parish of Orleans, State of La.

(Seal)

(Sgd.) JNO. B. SCANLAN,
Deputy Clerk.

101 EXHIBIT FILED IN DISTRICT COURT APRIL 30th, 1941.

State of Louisiana.

Civil District Court for the Parish of Orleans.

No. 238,169. Division "E". Docket 5.

In Re: Judicial Liquidation of Caldwell Brothers & Hart.

Filed January 14, 1941.

(Sgd.) T. S. BUCKLEY,
Deputy Clerk.

This shall certify to all whom it may Concern, That on the 10th day of January, in the year of our Lord one thousand nine hundred and forty-one, and the one hundred and sixty--fifth of the independence of the United States of America, an application was made to the Honorable Walter L. Gleason, Acting Judge of the Civil District Court for the Parish of Orleans, Division "E", by Mrs. Cora B. Hart, Executrix of the Estate of Monte E. Hart, and Vernon Caldwell and Summa Caldwell, praying that Sidney S. Bourgeois, Jr., and Louis H. Pilie, be appointed joint Liquidations.

Now, Know Ye, That Sidney S. Bourgeois, Jr., and Louis H. Pilie have been and they hereby appointed and confirmed as Joint Liquidators of the said partnership of Caldwell Brothers & Hart, and that they have fulfilled all requisites of law.

--Witness our hand and Seal of said Court at the City of New Orleans this 14th day of January in the year of our

Lord one thousand nine hundred and forty-one and the 165th of the independence of the United States of America.

(Sgd.) WALTER L. GLEASON,
Judge.

(Sgd.) T. S. BUCKLEY.

A True Copy.

(Sgd.) T. BUCKLEY,
Deputy Clerk, Civil District Court, Parish of Orleans, State of Louisiana.

(Seal)

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102 HEARING ON MOTIONS TO SUBSTITUTE PARTY DEFENDANTS.

(Number and Title Omitted.)

Extract from the Minutes.

February Term, 1941.

New Orleans, Wednesday, April 30, 1941.

Court met pursuant to adjournment;

Present: Hon. Wayne G. Borah, Judge.
Hon. A. J. Caillouet, Judge.

Borah, J.:

This cause came on this day to be heard upon:

1. Motion by plaintiff to substitute Mrs. Cora Buckman, Testamentary Executrix of the Succession of Monte M. Hart, as proper party defendant;

2. Motion by plaintiff to substitute Sidney Bourgeois and Louis H. Pilie, Joint Liquidators of Caldwell Bros. & Mart, as parties defendant.

Present:

Jacob J. Amato,

Of Counsel for the Plaintiff;

Warren Doyle,

Attorney for the Mrs. Cora Buckman, Executrix, and Sidney Bourgeois and Louis H. Pilie, Liquidators;

Absent:

Deutsch & Kerrigan,

Attorneys for Defendants, but submitting same.

Whereupon, after hearing statements of counsel present to the effect that there were no objections to the motions herein,

It is Ordered that the same be made absolute.

STATEMENT OF POINTS TO BE RELIED ON, AND DESIGNATION OF CONTENTS.

103 Filed April 16, 1941.

(Title Omitted.)

Statement of Points to be Relied on and Parts of the Record which Appellant Thinks Necessary for the Consideration thereof:

The Appellant intends to rely upon the errors of the United States District Court as follows:

1.

The United States District Court erred in entering a decree maintaining the defense of double jeopardy interposed by the defendants and dismissing plaintiff's action on that ground.

2.

The United States District Court erred in hearing and determining the defendants' plea of double jeopardy without a trial on the issues of fact involved.

3.

The United States District Court erred in sustaining the plea of double jeopardy interposed as a defense to plaintiff's qui tam action.

Pursuant to Civil Procedure Rule 75 A the Clerk is requested to prepare that portion of the transcript that is necessary.

1. Complaint.
2. Answer.
3. Motion to dismiss counter-claim.
4. Notice of motion to dismiss counter-claim.
5. All minute entrances.
6. Opinion.
7. Judgment.

8. Notice of Appeal.

9. Note of Evidence filed on hearing of Motions on September 23, 1940.

10. U. S. of America vs. N. O. Chapter of Associated General Contractors of America, et als, Criminal Docket #19-843.

11. Notice of Appeal of Defendants.

Dated: April 5, 1941.

KATZ & AMATO,
ORLOFF & KATZ, and
ALEXANDER H. SCHULLMAN,
By ALEXANDER H. SCHULLMAN,
Attorneys for Plaintiff and
Appellant.

April 16, 1941.

Service accepted.
DEUTSCH AND KERRIGAN,

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105 SUPPLEMENTAL PRAECIPE.

Filed May 2nd, 1941.

(Number and Title Omitted.)

Pursuant to Civil Procedure Rule 75 A the Clerk is requested to prepare the following supplemental portions of the transcript that is necessary; supplementing the request filed April 5, 1951.

12. Motions to substtute party defendants.

13. Letter of joint liquidators and Testamentary Executrix filed on April 30, 1941.

14. Judgment substituting party defendants.

(Sgd.) KATZ & AMATO,
(Katz & Amato)
JACOB J. AMATO,
Attorneys for Plaintiff and Appellant.

106 CLERK'S OFFICE.

I, A. DALLAM O'BRIEN, JR., Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 105 pages contain and form a full, true and complete transcript of the record, in the case entitled "United States of America on relation of Samuel Ostrager and Samueel Ostrager in his own behalf versus New Orleans Chapter, Associated General Contractors of America, Inc., et al", No. 259 of the Civil Action Docket of this Court, as made up in accordance with the Designation of Contents copied herein.

Witness my Hand and the seal of said Court at the City of New Orleans, La., this 8th day of May, A. D. 1941.

A. DALLAM O'BRIEN, JR.,
Clerk,
By H. W. NIEHUES,
(H. W. Niehues)
Deputy Clerk.

(Seal)

[fol. 114] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 25th, 1942

No. 9940

UNITED STATES OF AMERICA on relation of Samuel Ostrager and Samuel Ostrager in his own behalf

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al. (and Reverse Title)

On this day this cause was called, and, after argument by Julius Katz, Esq., for appellant and appellee, and Eberhard P. Deutsch, Esq., for appellees and appellants, was submitted to the Court.

[fol. 115] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9940

UNITED STATES OF AMERICA ON RELATION OF SAMUEL OSTRAGER, AND SAMUEL OSTRAGER, IN HIS OWN BEHALF, Appellant,

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al. (and Reverse Title), Appellees

Appeals from the District Court of the United States for the Eastern District of Louisiana

OPINION OF THE COURT—Filed April 15, 1942

Before Hutcheson, Holmes, and McCord, Circuit Judges

McCord, Circuit Judge: The appellant, Samuel Ostrager, an informer, brought a *qui tam* action on behalf of the United States of America and on behalf of himself to re-

cover from the appellees statutory forfeitures and double [fol. 116] damages under the provisions of 31 United States Code §§231, 232, 233, 234 and 235. These sections provide that where the United States has been defrauded by presentation of a false claim "upon or against the Government of the United States, or any department or officer thereof", suit may be brought and carried on by "any person, as well for himself as for the United States", to collect a forfeiture of $2,000.00 and, in addition, double the amount of damages which the United States may have sustained; and that the person bringing such suit and prosecuting it to final judgment "shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of damages he shall recover and collect."

The informer's complaint charges seventeen named defendants with having committed the same acts for which they had been previously indicted. The indictment, in substance, charged that the defendants had, with intent to defraud the United States, diverted, attempted to divert, and assisted in diverting for the benefit of themselves and another certain monies allocated out of the Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act, fiscal year 1936, and the First Deficiency Appropriation Act of 1936, for the purpose of constructing in the City of New Orleans, Louisiana, certain buildings for the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, to-wit: the foundation for the main building of the Charity Hospital. On January 15, 1940, the first count of the indictment, the conspiracy count, was nol-prossed; the second count was nol-prossed as to one defendant, and the other defendants entered pleas of *nolo contendere* and were fined by the court, $2,000.00 for the New Orleans Chapter, Associated General Contractors of America, Inc., and $200.00 for each of the other defendants. Shortly thereafter and on February 1, 1940, this informer's complaint was filed. The complaint alleges, as did the in- [fol. 117] dictment, that the defendants, being the only bidders on the Charity Hospital project, added certain agreed amounts to their bids, portions of which amounts were to be collected, and were collected, by the successful bidder out of the above-mentioned appropriations, and were to be paid, and were paid, to the New Orleans Chapter, Associated General Contractors of America, Inc., and by said

chapter distributed to the defendants and another. The complaint further alleges that the defendants formed a conspiracy to defraud the United States; that in furtherance of the conspiracy, the defendants, at a meeting of the Association, adopted a resolution requiring members to add to bids thereafter submitted the Association fees then in force, regardless of whether such bids were for government work or not; that defendants agreed to add in excess of $7,500.00 to their bids on the Charity Hospital foundation; that each defendant submitted a bid on the job and submitted certificates certifying that their bids were not sham or collusive; and that the government was defrauded in the amount of $7,620.00. The relator thereby sought to recover judgment for $15,240.00, double the amount of damages alleged to have been sustained by the government, plus a $2,000.00 forfeiture against each of the defendants.

The defendants interposed three defenses: The first defense was that the complaint failed to state a claim against defendants upon which relief could be legally granted. The second defense was that, contrary to the Fifth Amendment to the Constitution of the United States, the defendants were being twice put in jeopardy for the same offense. The third defense consisted of an answer on the merits which denied the essential allegations of the complaint. The defendants also filed a counterclaim by which they sought recovery from the informer for alleged libel contained in the complaint.

[fol. 118] In advance of trial the defendants provoked a hearing and requested the court to pass upon their first and second defenses, and moved for a separate trial on their counterclaim. At the hearing the court also heard the relator's motion to dismiss the counterclaim, to have the counterclaim stricken, and to strike all allegations contained in the second defense and certain other allegations contained in the third defense. The court found that there was no merit in the defense that the complaint failed to state a claim upon which relief could be granted. The court, however, sustained the second defense of double jeopardy and dismissed the complaint. The counterclaim was also dismissed as being premature. Both sides have appealed.

There is a divergence of opinion as to what does and what does not constitute double jeopardy in cases of this kind, and there are authorities which lend strong weight

to the view that such actions while civil in form are criminal in their nature and effect, and that a former acquittal or conviction may be invoked to bar recovery in a proceeding under the informer statutes. See and compare *United States v. La Franca*, 282 U. S. 568; *Helvering v. Mitchell*, 303 U. S. 391; *Coffey v. United States*, 116 U. S. 436; *United States v. Glidden Co.*, 78 F. 2d 639; *Marcus v. Hess*, 41 F. Supp. 197, reversed on other grounds, — F. 2d —; *United States v. Shapleigh*, 54 Fed. 126; *United States v. McKee*, 4 Dill. 128, 26 Fed. Cases 1116; *Olson v. Mellon*, 4 F. Supp. 947, affirmed 71 F. 2d 1021.

We prefer, however, to rest decision upon the contention that the complaint failed to state a claim against the defendants upon which relief could be legally granted under the statutes relied upon. The statutes involved must be strictly construed, and they permit recovery by an informer only when it is shown that the defendants have presented [fol. 119] a "claim upon or against the Government of the United States, or any department or officer thereof knowing such claim to be false, fictitious, or fraudulent." 31 U. S. C. §231.

Nowhere does the informer's complaint charge or allege that any false or fraudulent claim was made to, upon, or against the Government of the United States, or any department or officer thereof. Indeed, it is without dispute that the contract which was entered into and signed after the submission of bids was by and between the defendants and the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, a state board or agency. The successful bidder had no contract with the United States, and the mere fact that the project was financed in part by a federal grant to a state agency in no wise makes the Government of the United States a party to the contract for purposes of this suit. A claim against the United States could not be made by the contractor, for he had no contract with the government and he had no right to demand money from it. The Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, were the only parties who promised to pay the contractor, and he could look solely to this source for payment. Where the Board of Administrators secured the funds to pay the contractor is not material here. The claim of the defendants was against the Board, they had no claim against the United States, and

since no allegation is made in this complaint that a claim had been or could be made by the defendants against the government, this relator was not entitled to recover under these statutes and the complaint should have been dismissed. *United States ex rel. Marcus v. Hess*, 3 Circuit, No. 7841, decided March 23, 1942, reaffirmed March 26, 1942, — F. 2d —; Cf. *Mandel v. Cooper Corporation*, 42 F. Supp. 317.

It is the law of Louisiana that an action for damages for libel based on defamatory pleadings may not be main-[fol. 120] tained until termination of the judicial proceeding. Having dismissed the relator's complaint, the court committed no error in dismissing the defendants' cross-complaint and counterclaim. *Wolf v. Royal Ins. Co.*, 130 La. 679; *Manuel* v. *Deshotels*, 160 La. 652, 107 So. 478; *Robinson v. Freeman*, 172 So. 797; *W. B. Thompson & Co. v. Gosserand*, 128 La. 1029; *Howard v. Coyle*, 163 La. 257.

On both appeals the judgment is affirmed.

[fol. 121] JUDGMENT

Extract from the Minutes of April 15th, 1942

No. 9940

UNITED STATES OF AMERICA on relation of Samuel Ostrager and Samuel Ostrager in his own behalf,

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al.

(and Reverse Title)

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause on both appeals be, and the same is hereby, affirmed;

It is further ordered and adjudged that Samuel Ostrager, appellant, and the surety on his appeal bond herein, New Amsterdam Casualty Company, be condemned, in solido,

to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

[fol. 122] MOTION AND ORDER STAYING MANDATE — Filed May 5, 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 9940

UNITED STATES OF AMERICA on relation of Samuel Ostrager and Samuel Ostrager in his own behalf,

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

On motion of Samuel Ostrager, appearing herein through his undersigned counsel, Jacob J. Amato, and on suggesting to this Honorable Court that the mandate that is returnable on May 6, 1942 be stayed.

The plaintiff, through his undersigned counsel, are proceeding directly by petition for a Writ of Certiorari to the United States Supreme Court.

Wherefore, movers pray that this Honorable Court stay the mandate and for all general and equitable relief.

(Signed) Jacob J. Amato.

I hereby certify that a copy has been served upon the opposing counsels.

(Signed) Jacob J. Amato.

[fol. 123] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 9940

UNITED STATES OF AMERICA on relation of Samuel Ostrager and Samuel Ostrager in his own behalf
Appellant & Appellee,

vs.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al., Appellees & Appellants

(and Reverse Title)

On Consideration of the Application of the appellant and appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable him to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 5th day of May, 1942.

(Signed) Leon McCord, United States Circuit Judge.

[fol. 124] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 125] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 236

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is assigned for argument immediately following case No. 173, United States ex rel. Marcus vs. Hess.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.